Takong Tabari v Government of Sarawak & Ors and another appeal

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO Q-01-181 OF 1995 AND Q-01-182 OF 1995
SHAIK DAUD, SITI NORMA YAAKOB AND AHMAD FAIRUZ JJCA
5 AUGUST 1998

Civil Procedure *— Costs — Apportionment — State government supplied gas to premises occupied by bank — Appellant joined state government and bank in same action — Trial judge did not make Sanderson order — Whether order on costs should be varied*

Damages (Personal Injury or Death) *— Fatal accident — Dependency claim — Deceased killed in explosion — Appellant as widow sought damages — Trial judge deducted ⅓ from general damages for loss of dependency — Whether trial judge had erred in making deduction — Whether Parliament intended to depart from common law practice of making ⅓ deduction*

Tort *— Negligence — Fire — Apportionment of liability — Premises owned by bank — Gas supplied by state government — Trial judge apportioned 90% of liability to state government and 10% to bank — Whether bank should bear more responsibility — Whether there was misdirection by trial judge*

Civil Appeals Q-01-181-95 and Q-01-182-95 were heard together as the causes of action in both appeals arose from one incident. On 16 February 1990, at the premises of Public Bank Bhd in Miri ('the bank'), inflammable gas escaped and caused a series of explosions and fire that killed one Jeffrey Satuk Gabar ('the deceased') and seriously injured another. The appellant — the widow of the deceased — sought damages on behalf of herself, the other dependants of the deceased which included the deceased's four minor children and his aged parents and the estate of the deceased under ss 7 and 8 of the Civil Law Act 1956. She named the Government of Sarawak ('the state government') as the first defendant, Liew Yit Tze ('Liew') and Phua Su Meng ('Phua') as the second and third defendants respectively, they being the registered proprietors of two adjoining plots of land which had been sub-leased to the bank. The trial judge deducted ⅓ from the total sum of general damages for loss of dependency. The appellant appealed on the grounds that the ⅓ of the dependency claim should not have been deducted and also that the trial judge should have ordered that Liew's costs payable by her be added in the costs recoverable by her from the state government and the bank. Alternatively, the appellant argued that Liew's costs should be paid directly by his unsuccessful co-defendants, the state government and the bank.

Held, partly allowing Civil Appeal No Q-01-181-95 relating to cost and dismissing Civil Appeal No Q-01-182-95:

(1) There had been no misdirection on the part of the trial judge to conclude that the state government bore the heavier responsibility for the explosions and fire than the bank. Since there was available material on which the trial judge exercised his discretion in the manner it was done, there was no reason to disturb his finding of apportionment that the state government bore 90% of the blame and the bank 10% (see p 522B–D).

(2) The common law practice of making deductions for contingencies, other vicissitudes of life and accelerated payment continues to be in force as Parliament had not expressed its intention to depart from the general system of law. Under such circumstances, the trial judge made no error of law when he made the ⅓ deduction (see pp 522I and 523A–B); *Chan Chin Ming & Anor v Lim Yok Eng* [1994] 3 MLJ 233 followed.

(3) It was reasonable and proper for the appellant to have joined both the state government and the bank in the same action as it was the state government that brought and supplied the gas to the demised premises occupied by the bank. Further, the supply and connection of the gas to the demised premises was without the bank's knowledge and negligence had been pleaded and proven against them. Since the trial judge did not exercise his discretion as to making a 'Sanderson order', the order of costs payable to Liew was varied in that such costs be paid directly by the state government and the bank in the proportions of their respective liability (see pp 523I and 524A–C).

[Bahasa Malaysia summary

Rayuan Sivil Q–01–181–95 dan Q–01–182–95 telah didengar bersama kerana kausa-kausa tindakan di dalam kedua-dua rayuan ini berbangkit dari satu insiden. Pada 16 Februari 1990, di premis Public Bank Bhd di Miri ('bank'), gas mudah terbakar telah terlepas dan menyebabkan beberapa siri letupan dan kebakaran yang telah menyebabkan kematian Jeffrey Satuk Gabar ('si mati') dan telah menyebabkan seorang lagi cedera parah. Si perayu — balu kepada si mati — menuntut ganti rugi bagi pihak dirinya sendiri, lain-lain tanggungan si mati yang terdiri daripada empat orang anak kecil si mati dan kedua ibubapa si mati yang telah tua dan waris si mati di bawah ss 7 dan 8 Akta Undang-Undang Sivil 1956. Perayu telah menamakan Kerajaan Negeri Sarawak sebagai defendan pertama, Liew Yit Tze ('Liew') dan Phua Su Meng ('Phua') sebagai defendan kedua dan ketiga, mereka sebagai pemilik-pemilik berdaftar kepada dua petak tanah yang bersempadan antara satu sama lain yang telah diduduki oleh bank atas pajakan kecil. Hakim perbicaraan telah memotong ⅓ daripada jumlah keseluruhan gantirugi am bagi kehilangan tempat pergantunggan. Perayu merayu atas alasan pemotongan ⅓ daripada tuntutan bagi kehilangan tempat bergantung adalah tidak berpatutan dan hakim perbicaraan seharusnya memerintahkan kos yang harus

dibayar oleh Liew kepadanya hendaklah dimasukkan sekali ke dalam kos yang boleh dituntut olehnya daripada kerajaan negeri dan bank. Sebagai alternatif, perayu mengatakan bahawa kos yang perlu dibayar oleh Liew hendaklah dibayar oleh defendan bersamanya iaitu kerajaan negeri dan bank.

Diputuskan, membenarkan sebahagian Rayuan Sivil No Q–01–181–95 berkenaan dengan kos dan menolak Rayuan Sivil No Q–01–182–95:

(1) Tiada penyalaharahan daripada hakim perbicaraan apabila dia menyimpulkan bahawa kerajaan negeri menanggung beban yang lebih besar daripada bank terhadap letupan-letupan dan kebakaran itu. Memandangkan terdapatnya bahan yang menunjukkan bagaimana hakim perbicaraan telah melaksanakan budibicaranya, tidak ada sebab untuk mengubah pembahagian beban yang telah dicapai olehnya, iaitu kerajaan negeri menanggung 90% daripada beban dan bank 10% (lihat ms 522B–D).

(2) Pengamalan common law di dalam membuat pemotongan-pemotongan bagi kontingensi-kontingensi, lain-lain jatuh bangun dalam kehidupan dan mempercepatkan pembayaran, terus berkuatkuasa kerana Parlimen tidak meluahkan apa-apa niatnya untuk berpisah daripada sistem undang-undang secara am. Dalam keadaan sebegini, hakim perbicaraan tidak membuat apa-apa kesalahan undang-undang apabila beliau membuat pemotongan sebanyak ⅓ itu (lihat ms 522I dan 523A–B); *Chan Chin Ming & Anor v Lim Yok Eng* [1994] 3 MLJ 233 diikut.

(3) Adalah munasabah dan wajar bagi perayu apabila menggabungkan kedua-dua kerajaan negeri dan bank di dalam satu tindakan yang sama kerana kerajaan negeri telah membawa dan membekalkan gas kepada premis-premis yang diduduki oleh bank. Tambahan pula, pembekalan dan penyambungan gas ke premis tersebut adalah tanpa pengetahuan pihak bank dan kecuaian telah pun dibangkitkan dan dibuktikan terhadap mereka. Memandangkan hakim perbicaraan tidak melaksanakan budi bicaranya bagi memberi satu 'Sanderson order', perintah untuk kos yang perlu dibayar kepada Liew adalah dipelbagaikan, iaitu kos tersebut hendaklah dibayar terus oleh kerajaan negeri dan bank menurut pembahagian liabiliti masing-masing (lihat ms 523I dan 524A–C).]

Notes

For cases on apportionment of costs, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1197–1199.

For cases on dependency claim, see 6 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 299–310.

For cases on fire, see 12 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 500–507.

Cases referred to

Bullock v London General Omnibus Co & Ors [1907] 1 KB 264 (refd)
Chan Chin Ming & Anor v Lim Yok Eng [1994] 3 MLJ 233 (folld)
Foong Nan v Sagadevan [1971] 2 MLJ 24 (refd)
KE Hilborne v Tan Tiang Quee [1972] 2 MLJ 94 (refd)
Kek Kee Leng v Teresa Bong Nguk Chin & Anor [1978] 1 MLJ 61 (refd)
Kerry v Carter [1969] 3 All ER 723 (refd)
Petroliam Nasional Bhd (Petronas) & Anor v Cheah Kam Chiew [1987] 1 MLJ 25 (refd)
Rylands v Fletcher [1861–73] All ER Rep 1 (refd)
Sanderson v Blyth Theatre Co [1903] 2 KB 533 (refd)
Sepang Omnibus Sdn Bhd v Christina Loh Soo Peng & Ors [1970] 2 MLJ 234 (refd)

Legislation referred to

Civil Law Act 1956 ss 7, 8
Rules of the High Court 1980 O 59 r 3(2)

Appeal from: Suit No MR 5 of 1993 and Suit No MR 60 of 1992 (High Court, Miri)

Mekanda Singh Sandhu (*MS Sandhu & Co*) for the appellant in Civil Appeal No Q–01–181–95 and the first appellant in Civil Appeal No Q–01–182–95.

Abdul Razak Tready (*Supian Tarmizi bin Hj Mohd Tajuddin* with him) (State Attorney-General's Chambers) for the first respondent in Civil Appeal No Q–01–181–95 and the appellants in Civil Appeal No Q–01–182–95.

Lili Puk (*Abang Zen Puk & Co*) for the second respondent in Civil Appeal No Q–01–181–95 and the fifth respondent in Civil Appeal No Q–01–182–95.

David Lim Chin Chai (*Voon Chai Thong* with him) (*Wan Ullok Jugah Chin & Co*) for the third respondent in both Civil Appeals No Q–01–181–95 and Q–01–182–95.

Chin Yoon Yet (*Keith Chin Shiun* with him) (*Yong Wong & Chin*) for the second respondent in Civil Appeal No Q–01–182–95.

Siti Norma Yaakob JCA (delivering judgment of the court): Civil Appeals Q–01–181–95 and Q–01–182–95 were, with the consent of all parties, heard together as the causes of action in both appeals arose from one common tragedy. That tragedy happened on 16 February 1990 at 10am at the premises of Public Bank Bhd in Miri ('the bank') when inflammable gas escaped, got ignited and caused a series of explosions and fire that killed a customer of the bank, one Jeffrey Satuk Gabar ('the deceased'), and seriously injured another, one Chin Fuei Yung @ Chooi Ngung Choi ('Chin').

The widow of the deceased, as the administratrix, filed civil suit No MR 5/93 ('the first suit') in Miri seeking damages on behalf of herself, the other dependants of the deceased which included the deceased's four minor children and his aged parents and the estate of the deceased under ss 7 and 8 of the Civil Law Act 1956 ('the Act'). She named the Government of Sarawak ('the state government'), the supplier of gas in the town of Miri as the first defendant, Liew Yit Tze ('Liew') and Phua Su Meng ('Phua') as the second and third defendants respectively, they being the registered proprietors of two adjoining plots of land, Lots 292 and 293, together with a building erected thereon which Liew and Phua had sub-leased to the bank, who in turn is cited as the fourth defendant.

The principal causes of action in that suit are:

(1) strict liability following the escape of gas, a dangerous thing, under the *Rylands v Fletcher* [1861–73] All ER Rep 1 rule against all four defendants;

(2) further or in the alternative, negligence against all four defendants;

(3) further or in the alternative, public nuisance against all four defendants; and

(4) further or in the alternative, breach of duty of care on the part of the bank as an occupier.

Chin had also filed separate proceedings in civil suit No MR 60/92 ('the second suit') claiming special damages amounting to RM244,206.72 and general damages for pain and suffering against Liew, Phua and the bank based on three causes of action similar to those listed as (1), (2) and (3) above. In the course of the proceedings, the bank joined its building consultant, Perunding Dayacipta ('Perunding'), who renovated the demised premises before the bank moved in, the Director of the Public Works Department ('the Director') and the state government as the first, the second and the third parties respectively claiming indemnity and/or a right for contribution from the said third parties against the claims of Chin for damages and costs. Likewise, Liew joined the Director and the state government as third parties seeking indemnity and/or contribution from them in the same manner as was done by the bank.

Judgment had already been entered against Phua in the first suit and the writ of summons in the second suit has not been served on him and for all intents and purposes, he is in no way concerned with the instant appeals before us.

The claims of the widow and Chin were strenously disputed by the other defendants and third parties and a general defence of denial of liability as well as specific ones that include unlawful tampering of the gas pipes and volenti non fit injuria were raised by them.

In the High Court, there was a joint trial of both civil suits and the proceedings were geared towards proving liability on the torts of negligence, strict liability and public nuisance against all the defendants and third parties and additionally occupier's breach of duty against the bank. Once liability was established, the learned trial judge proceeded to determine the

various monetary claims made by the widow and Chin in their respective civil suits. The widow abandoned her claims grounded on strict liability under the *Rylands v Fletcher* rule and public nuisance.

From the documentary and oral evidence of 12 witnesses testifying on behalf of the widow and Chin and 10 other defence witnesses called by the defendants and third parties, the learned trial judge made the following findings.

The first suit

(1) The state government is vicariously liable for the negligence of its agent, the Director for failing to take appropriate steps to ensure safety after they had supplied and connected the gas to the demised premises. Judgment with costs is entered for the widow against the state government.

(2) No blame can be attached to Liew as he had no part in the cause of the accident. Judgment is entered in his favour against the widow.

(3) For failing to take steps to investigate the foul smell that permeated the premises before the tragedy, the bank is held partly negligent for its omission that led to the happening of the accident.

(4) Alternatively, the bank is liable for breach of its duty as an occupier to take care that its premises were safe.

(5) Liability between the state government and the bank is apportioned at 90% on the part of the state government and 10% on the part of the bank.

The second suit

(6) Judgment is entered for Chin against the bank.

(7) Perunding is free from any blame as there is no evidence to support the bank's allegations that Perunding's renovation works on the demised premises were defective or that their contractors meddled with the gas pipes. Thus the bank's claim for indemnity or contribution from Perunding in the second suit is dismissed with costs.

(8) Judgment is entered for the bank in respect of its claim for indemnity or contribution from the Director and the state government.

(9) No blame can be attached to Liew and judgment is entered in his favour against Chin. Consequently, Liew's claim for indemnity or contribution against the Director and the state government was not entertained.

(10) The liability between the bank and the Director and the state government be apportioned against them on the basis of 10% against the bank and 90% against the Director and the state government.

(11) Chin's claim on strict liability under the *Rylands v Fletcher* rule against Liew, Phua and the bank fails for lack of evidence. Likewise, Chin's claim for public nuisance against the same three defendants is dismissed for want of proof.

Consequent upon the aforesaid findings, the learned trial judge made the following awards.

The first suit

(1) RM270,000 for loss of dependency but from this amount, he deducted ⅓ for contingencies, other vicissitudes of life and accelerated payment thereby leaving a balance sum of RM180,000 as general damages.

(2) The general damages payable is apportioned between the dependants of the deceased in the proportion of 20% to the widow, 15% each to the first two daughters of the deceased, 20% each to the only son of the deceased and the youngest daughter and 5% each to his aged parents. The amounts payable to the minor children are to be paid to the Public Trustee on trust until they reach majority.

(3) RM10,000 for bereavement payable to the widow under s 7(3A) of the Act.

(4) RM3,000 as funeral expenses with interest at the rate of 3% per annum from 16 February 1990 to date of trial.

(5) As death was not instantaneous, RM3,000 is awarded to the estate of the deceased for pain and suffering.

(6) Interest at the rate of 8% per annum on the judgment debt from 17 October 1995 to date of realization.

(7) Costs to be paid to the widow by the government and the bank in the proportions of their respective liability.

(8) The widow is to pay Liew's taxed costs.

(9) All sums due from the Government and the bank are to be apportioned in the ratio of 90:10.

The second suit

(10) Chin is awarded RM50,000 as general damages for the 36%–37% second and third degree burns he suffered. In addition, he is also awarded the following special damages:

  (i) RM20,000 for loss of earnings.

  (ii) RM400 for loss of clothing, shoes, watch and spectacles.

  (iii) RM124,152.10 for medical fees, hotel charges, taxi fares, airfares and other incidentals for his treatments in Singapore.

(11) Interest at 3% per annum on the special damages from 16 February 1990 to date of trial.

(12) Further interest at 8% per annum on the judgment debt from 17 October 1995 to date of realization.

(13) Costs to be borne by the state government and the bank in the proportions of their respective liability.

(14) The bank is to meet payment of the full quantum of damages as awarded to Chin totalling RM194,552.10 and costs to be taxed

A subject to it seeking contribution from the Director and the state government, the third parties, in the proportion of their joint liability ie 90%.

(15) Chin is to pay Liew's costs to be taxed.

(16) The bank is to pay Perunding's costs to be taxed.

B It is against the above findings and awards that notices of appeal have been lodged by:

(1) the widow, who:

(a) limits her appeal to the RM90,000 deducted from the total loss C of dependency which had been assessed at RM270,000. She contends that there should not be any deduction; and

(b) maintains that when ordering that she pays Liew's taxed costs, the learned trial judge should have further ordered that Liew's costs payable by her be added in the costs recoverable by her from the state government and the bank ('Bullock order', so D called following the order made in *Bullock v London General Omnibus Co & Ors* [1907] 1 KB 264). Alternatively, Liew's costs be paid directly by his unsuccessful co-defendants, the state government and the bank ('Sanderson order', so called following the order made in *Sanderson v Blyth Theatre Co* [1903] E 2 KB 533). Before us, she opted for the direct form of order, ie the 'Sanderson order'.

(2) the state government.

Although the notice of appeal filed by the state government states that it is appealing against the whole decision of the learned trial judge ie liability F and quantum, before us, it was confined to the extent of apportionment of liability only. Whilst conceding that it was liable, nonetheless the state government contends that the extent of its liability when compared to that of the bank is minimal. As the occupier of the demised premises, the bank was in complete control of such premises and should have been more G vigilant when its staff detected the smell of gas a month before the tragedy happened. The bank did not notify the Director of the presence of the smell and apart from spraying air fresheners to rid itself of the smell, the bank took no positive step to investigate the source of the smell. For such omission, the state government contends that the bank should carry the higher burden of responsibility and liability be apportioned 80% on the H part of the bank and 20% on its part.

At this juncture, it is pertinent to ask under what circumstances can an appellate court vary or alter an apportionment made by a judge at first instance? That same question was posed to the English Court of Appeal in the case of *Kerry v Carter* [1969] 3 All ER 723, where Lord Denning MR I answered it in the following manner (at p 726D–F):

> So we have both sides at fault, and we are left with the question of apportionment. We have been referred to cases on this subject, particularly the recent case of *Brown v Thompson* [1968] 2 All ER 708. Since that case,

> it seems to have been assumed in some quarters that this court will rarely, if ever, alter an apportionment made by the judge. Such is a misreading of that case. I think that the attitude of this court was correctly stated in that case by Edmund Davies LJ when he quoted from the judgment of Sellers LJ in *Quintas v National Smelting Co Ltd* [1961] 1 All ER 630 at p 636. This court adopts in regard to apportionment, the same attitude as it does to damages. We will interfere if the judge has gone wrong in principle or is shown to have misapprehended the facts; but, even if neither of these is shown, we will interfere if we are of opinion that the judge was clearly wrong. After all, the function of this court is to be a court of appeal. We are here to put right that which has gone wrong. If we think that the judge below was wrong, then we ought to say so, and alter the apportionment accordingly.

In that case, the plaintiff, an 18½ year old apprentice, was allowed by the defendant, a farmer, to use a circular saw. The plaintiff's only previous experience of circular saws was the instructions he had received in their use at a technical college which he attended when he was 15 years old and on a single occasion when he operated one on another farm 2½ years ago, when he was 16. Nevertheless, when the defendant asked him if he knew how to use the saw, he said that he did and the defendant only watched for a few minutes before leaving him to work it on his own. The plaintiff put his hand across the path of the saw, slipped and severely injured his hand. In an action for damages, the judge found both parties to blame for the accident and having been told wrongly that the plaintiff was 17½ years old at the time of the accident, apportioned liability to the plaintiff at 20% and to the defendant 80%.

The Court of Appeal confirmed the trial judge's finding as to liability but found that there had been misdirection on his part on the apportionment of blame and altered it so as to hold that two-thirds of the blame fell on the plaintiff and one-third on the defendant. This is so as firstly, the trial judge fell into error regarding the age of the plaintiff although the trial judge was not to be blamed and secondly, by the trial judge's failure to consider the plaintiff's own conduct in misleading the defendant as to the nature and extent of his previous experience of working on a saw of that sort and thirdly, what the plaintiff actually did while working the machine. We hasten to add that the principles enunciated in *Kerry v Carter* have been followed by our then Federal Court in:

(1) *Sepang Omnibus Sdn Bhd v Christina Loh Soo Peng & Ors* [1970] 2 MLJ 234:

(2) *Foong Nan v Sagadevan* [1971] 2 MLJ 24; and

(3) *Kek Kee Leng v Teresa Bong Nguk Chin & Anor* [1978] 1 MLJ 61.

Applying the aforesaid test, we now consider whether the bank should shoulder the greater share of the blame than the state government and whether the learned trial judge erred or misdirected himself when he found otherwise.

In this respect, we can do no better than to quote the learned trial judge as to the extent of the bank's liability as follows:

A As for the Public Bank, it is my finding based on the evidence adduced that it could not be held responsible for bringing or allowing the supply of gas into the premises. Similarly, there was no evidence adduced to show that the Public Bank had the knowledge of the gas supply when it took possession of the premises. Hence, there was no basis for the contention of the learned counsel for the plaintiff in the first action that the Public Bank or its B employees or agents did not take precautions on the safety of the gas pipe when the renovation works were done. There was also no evidence adduced that the Public Bank knew of the existence of the gas pipe in the course of the renovation works. Thus, in my view it could not be expected to take steps at that point in time.

But I find merit in the argument that the Public Bank, through its C employees, including the branch manager, failed to take steps after becoming aware of the unfamiliar smell in the premises. PW4, Marcell Usop @ Usop bin Pak, testified that prior to the accident, he smelt gas when he reported for work at 8.40am that morning of 16 February 1990. But this witness also said that as he smelt benzene, it prompted him to ask the guard on duty if the motorcycles were parked inside the premises. The reply was in the D negative. That should have triggered him to check further. After all this witness testified that he spoke to his branch manager about the smell on 15 February 1990 but the latter did not do much except to use the air freshener in his room. Further, PW9 Wilson Ling Kuai Kwong corroborated PW4 when he said that he smelt something one month before the accident but he did not know what it was.

E It is obvious from the evidence that none of the employees of the Public Bank did anything although the smell, whether it was benzene or something else, should have prompted them to investigate. There was no evidence adduced to explain the inaction of the employees. Thus, the omission on the part of the Public Bank, through its staff, to a certain degree led to the happening of the accident. For that, it is my finding that some blame should F be attributed to the Public Bank. As to what extent, I will deal with that later.

Against such findings by the learned trial judge there is the undisputed fact that it is the policy of the state government through its agent, the Director, to install gas pipes to all premises in Miri and without any request for G supply would connect the gas to all the premises. There is evidence that Phua was not on the list of accredited gas consumers and he never applied for the gas supply to his premises at shop lot No 293 that was occupied by the bank, and neither did the bank request for supply. In the case of Liew, the registered proprietor of the adjoining lot that was also occupied by the bank, there was the undisputed evidence that as early as 1 November H 1986, he had applied to disconnect the gas supply and no bills of charge were received by him.

There is also the added evidence that the Director installed gas meters to the demised premises but never informed Liew or Phua of this fact and neither was any leak detection test carried out to the internal plumbing or I after the meters were installed. Under those circumstances, we consider that the omission on the part of the bank to investigate the source of the smell that permeated the premises one month before the explosions and fire or to connect that smell to that of leaked gas was understandable.

Firstly, the bank was not aware that there were gas pipes supplying gas to its premises and secondly the smell was not distinctive enough to suggest that it was gas. However, we hasten to add that the omission to investigate does not absolve the bank from blame whatsoever.

On the face of the records, we consider that there has been no misdirection or error on the part of the learned trial judge to conclude that the state government bears the heavier responsibility for the explosions and fire than the bank. The state government, through its agent the Director, after installing the gas pipes, sourcing the supply and fixing the meters without any request to do so on the part of the consumers, they being Liew, Phua and the bank, did nothing more to ensure the safety of the users of the premises. By contrast, by having mere control of such premises without more, the bank's share of responsibility for the tragedy cannot be greater than that of the state government. Since there was available material on which the learned trial judge exercised his discretion in the manner it was done, we see no reason to disturb his finding of apportionment that the state government bears 90% of the blame and the bank 10%. We confirm that apportionment as being rightly made in law.

As we have stated earlier, the widow's appeal is twofold:

(1) the ⅓ deduction of RM90,000 against the total award for loss of dependency, the objection being the right to deduct but not the amount deducted; and

(2) the liability to pay Liew's costs.

For loss of dependency, the learned trial judge had on the formula provided by s 7(3)(iv)(d) of the Act calculated the deceased's loss of earnings on the multiplier of nine years purchase and a multiplicand of RM2,500 per month after all the allowable deductions were made. These two figures are not disputed and a total sum of RM270,000 was reached as general damages for loss of dependency. The learned trial judge did not stop there but went on to deduct a sum of RM90,000 equivalent to ⅓ from the total sum calculated, thereby leaving a balance of RM180,000 payable. Apart from stating that the ⅓ deduction was for contingencies, other vicissitudes of life and accelerated payment, he did not identify what such deduction related to.

It is the widow's contention that such a deduction is contrary to law as by the introduction of proviso (d) to s 7(3)(iv) of the Act on 1 October 1984, the discretion to deduct a sum for contingencies, other vicissitudes of life and accelerated payment at common law is now no longer available and with the replacement of that common law practice, there is already a built-in deduction in the statutory formula itself and a further deduction as was done in this case was not proper. She contends that the estate is entitled to be paid the total sum of RM270,000 for her claim for loss of dependency. For this contention, she relies on the minority decision of the Supreme Court in the case of *Chan Chin Ming & Anor v Lim Yok Eng* [1994] 3 MLJ 233.

As a court that is inferior to the Supreme Court, we are bound by the principle of stare decisis to accept the majority decision in *Chan*'s case.

That majority judgment states that as a matter of interpretation, if Parliament had intended to depart from the general system of law, it would express its intention with irresistible clearness. Since it found such clearness missing in proviso (d), the common law practice of making deductions for contingencies, other vicissitudes of life and accelerated payment continues to be in force. Under such circumstances and in reliance of the majority decision in *Chan*'s case, we found that the learned trial judge made no error of law when he made the deduction and reduced the claim for loss of dependency to RM180,000.

We now come to the widow's appeal against her liability to pay Liew's taxed costs. She claims that a 'Sanderson order' should have been made and that Liew's costs be borne directly by his unsuccessful co-defendants, the state government and the bank in the proportions of their respective liability. This is so as at the time the first suit was filed, it was not possible to ascertain who was responsible for the explosions and fire at shop lots 292 and 293. This uncertainty is reflected in her re-amended statement of claim where she had sued all four defendants for negligence. Liew in turn threw the blame to the state government, the supplier of the gas and the bank, as the sub-lessee and occupier of the demised premises where the explosions and fire occured in his statement of defence.

In *Sanderson v Blyth Theatre Co*, the English Court of Appeal held that where relief is claimed against more than one defendant in the alternative, the court has jurisdiction in a proper case to order the unsuccessful defendant to pay the costs of the successful defendant.

What constitutes a proper case, must, we say, depends on the facts of each case. We fully appreciate that costs are in the discretion of the trial court and that an appellate tribunal would only interfere in the exercise of such discretion if it can be shown that the discretion had been exercised on wrong principles. See the cases of *KE Hilborne v Tan Tiang Quee* [1972] 2 MLJ 94 and *Petroliam Nasional Bhd (Petronas) & Anor v Cheah Kam Chiew* [1987] 1 MLJ 25.

In the instant appeals, the learned trial judge has not stated any reason why he had ordered the widow to pay Liew's costs. We can only assume that he did so on the general principle that costs should follow the event. In this regard, O 59 r 3(2) of the Rules of the High Court 1980 contains the following provisions:

> If the Court in the exercise of its discretion sees fit to make any order as to costs of or incidental to any proceedings, the Court shall, subject to this Order, order the costs to follow the event, except where it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the cost.

From our understanding of the aforesaid provisions, it appears that the learned trial judge has the jurisdiction to make orders of costs in the nature of a 'Bullock' or 'Sanderson order', provided the circumstances warrant the making of such an order.

On the facts of the appeals before us, we ask whether it was reasonable and proper for the widow to have joined both the state government and the

bank in the same action. We answer this in the affirmative as it was the state government that brought and supplied the gas, a dangerous thing, to the demised premises occupied by the bank. Evidence was later shown that the supply and connection of the gas to the demised premises was without the bank's knowledge. The same cause of action ie negligence has been pleaded and proven against them. Additionally, an occupier's breach of duty has been pleaded in the alternative and proven against the bank as well.

In this respect, we feel that had the learned trial judge considered the rather unusual aspect of the widow's claims, he would have appreciated that the surrounding circumstances call upon him to exercise his discretion in the manner now argued before us. Since he did not do so, it falls upon us to correct what was not correctly decided and in so doing, we vary the order of costs payable to Liew in that such costs be paid directly by the state government and the bank in the proportions of their respective liability.

As the widow has succeeded partly on her appeal, we had allowed Civil Appeal No Q–01–181–95 to the extent that the costs payable to Liew be paid directly by the state government and the bank in the proportions of their respective liability. The order of the learned trial judge on Liew's costs was accordingly varied. However, the widow's appeal on the ⅓ deduction on her claim for dependency is dismissed. We confirm the learned trial judge's order of such deduction and granted her ½ the costs of her appeal to be paid by the state government and the bank in the proportions of their respective liability. The deposit made in this appeal is to be refunded to the widow.

As for the Director and the state government's appeal, Q–01–182–95, for the reasons appearing in this judgment, we dismissed it with costs here and below.

Order accordingly.

Reported by David Lai